whose right is recognised. This claim to retirement benefits must, of course, be based on an implied term of the contract of service, just as much as the claim to salary during illness. The underlying principles, as stated by Scrutton L.J., in his judgment quoted earlier, is an unhesitating assumption of *consensus ad idem* in respect of any tacit agreement. In the circumstances of this case it seems to me that, while an implied term to pay a reasonable sum would have been the proper inference before the negotiation of the union agreement, the conclusion of that agreement on January 30, 1963 altered the situation, at least in so far as the employer was concerned. It can no longer be assumed, as a matter of course, that the respondent did not consider himself, as he claimed, in no position to give the appellant preferential treatment. The fact that the appellant believed otherwise cannot be a substitute for *consensus* where in fact there was none — except to a limited extent. Consequently, the appellant must be content with half a loaf rather than no bread. The respondent was clearly willing to pay, by way of retirement benefits, the amount stated in writing in Exhibit P.9, as being in accordance with the union agreement. I have carefully considered whether the amount stated can be split and have come to the conclusion that it cannot. The portion ascribed to retirement benefits was based on the union agreement and that agreement itself provided for a scale of salary increments upon which the retirement benefits should be calculated. The two parts are consequently not severable. The 3 per cent of total salary had to be calculated on a salary scale which was only $450 per month at its lowest. The court cannot make a new scale in place of the one which exists. In my view, therefore, the appellant ought to be awarded the whole of the amount offered, that is to say, $2,886.81, by way of retirement benefits.

I would accordingly allow this appeal and give judgment in the appellant's favour for the sum of $7,686.81, with interest at the rate of 6 percent per annum from July 1, 1966, the date the writ was served on the respondent, and costs.

Gill and Ali FJJ. concurred.

Appeal allowed.

Solicitors: *Richard Talalla & Co; Athi Nahappan & Co.*

CHIN KIM & ANOR. v. LOH BOON SIEW

[F.C. (Ong C.J. (Malaya), Gill & Ali FJJ.) December 9, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X.80 of 1969]

Contract — Repudiation by one party to a contract — Effect of — Option of other party — Delay in exercising rights under contract — Inference of acquiescence in repudiation — Claim for specific performance cannot succeed — Contracts (Malay States) Ordinance, 1950, s. 40.

The parties had entered into a contract for sale of land in Kuala Lumpur on May 16, 1961. One of the conditions of the contract was that on payment by the purchaser of the sum of $40,000 the vendors undertook to take steps to apply to the Rent Assessment Board for permission to evict the tenants on the land. It was also provided that if the vendors were unable to give vacant possession of the land they would refund the sum of $40,000 to the purchaser. The purchaser on May 5, 1962 purported to exercise his option under the contract of sale and sent $40,000 to the vendors. Subsequently on or about June 8, 1962 the deposit was returned by the vendors on the ground that the option had not been duly exercised. The purchaser took no further steps until the writ in the action was issued on August 29, 1966, in which he claimed specific performance of the contract. The High Court having ordered specific performance, the vendors appealed.

Held, allowing the appeal: in this case on repudiation of the contract by the vendors the purchaser should have made his position clear as to whether he accepted the repudiation or refused to accept it; in view of the delay of the purchaser, the proper inference was that he had accepted the rescission. In the circumstances he was not entitled to specific performance.

Cases referred to:-

(1) *White & Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413, 427.

(2) *Frost* v. *Knight* L.R. 7 Ex. 111, 112.

FEDERAL COURT.

R. R. Chelliah for the appellants.

Ng Ek Teong for the respondent.

Cur. Adv. Vult.

Ong C.J.: This is an appeal against the decision of the High Court at Kuala Lumpur given on June 19, 1969 ordering specific performance by the vendors of an agreement dated May 16, 1961 for the sale of land.

Wong Choong and Chin Kim, his wife, were the registered co-owners in equal shares of a piece of land at Treacher Road in the residential zone of Kuala Lumpur. Loh Boon Siew was in search of a suitable place for his motor-car showrooms. On May 16, 1961 they entered into an agreement for the sale and purchase of this land at the price of $160,000 or approximately $4 per square foot. Situate on the land were the vendors' family residence and some out-houses let to tenants protected under the Control of Rent Ordinance 1956 then in force. As the land was required by the purchasers for commercial purposes, the agreement contained certain stipulations relating to planning permission to be applied for and proceedings taken by the vendors thereafter for ejectment of their tenants so as to be able to give the purchaser vacant possession.

Briefly, the agreement was as follows. In consideration of $1,200 paid to them by the purchaser the vendors granted him an option of purchase at the price of $160,000 to be exercised within 6 months. During such period the purchaser was to supply plans for submission by the vendors to the authorities for planning permission. Upon receipt of such permission the purchaser was to pay the vendors forthwith the sum of $40,000 by way of deposit to account of the purchase price and the balance of $120,000 within 6 months thereafter; but, in the event of permission being refused, the option was to be automatically extended for a further 6 months, so that the expiry date became 12 months from May 16, 1961. In the event planning

permission was not forthcoming and the option became extended accordingly.

The agreement went on to provide for the contingency where, in default of planning permission, the purchaser was still desirous to complete and paid the agreed deposit. The relevant provisions were as follows:—

"7. Immediately on receipt of the sum of dollars forty thousand ($40,000) only, the vendors hereby undertake to take such steps as may be deemed necessary including legal proceedings to evict their tenants on the said land and shall immediately apply to the President or Chairman of the Rent Assessment Board for a certificate that the Rent Assessment Board is satisfied that the owners of the said land intend to demolish all buildings on the said land for the purpose of rebuilding and in its opinion it is in the public interest that they should be permitted to do so. All costs and expenses in this connection shall be borne by the vendors.

8. If, within six (6) months from the date of the said deposit the vendors are unable to give vacant possession of the said land, the purchaser or the nominee has the exclusive right to terminate the agreement and the vendors shall immediately refund to the purchaser or nominee the sum of dollars forty thousand ($40,000) free of interest and this agreement shall be null and void.

13. Time wherever mentioned in this agreement shall be the essence of this contract."

On May 5, 1962 — 10 days before the extended expiry date — the purchaser purported to exercise his option by remitting from Penang $40,000 by cheque to the solicitor in Kuala Lumpur who was acting for both parties. In the meantime Wong Choong had met an untimely death on May 5, 1962, having appointed the Public Trustee executor of his will. The latter accepted the appointment and on or about June 8, 1962 both he and the widow returned their respective shares of the $40,000 sent to them by cheque, on the ground that the option had not been "duly exercised". Thereafter there was no further correspondence between the parties, or any intimation given by the purchaser as to his intentions regarding the property until writ in this action was issued in the High Court on August 29, 1966.

By their defence the vendors pleaded illegality in that they were required by the agreement to make false representations to the Rent Assessment Board; default on the part of the purchaser to exercise the option in strict compliance with the terms of the agreement and that, time being of the essence of the contract, delay on his part disentitled the purchaser to specific performance.

On the first ground the learned trial judge held that, by reason of the purchaser having waived the requirement of vacant possession, the vendors were no longer under any obligation to apply to the Rent Assessment Board or do anything contrary to law in connection therewith. He held further that the tender of $40,000 before the expiry of the option was in effect a valid exercise of the option and that the purchaser's delay — although lasting well over four years before commencement of action — did not defeat his claim, as time was not of the essence of the contract except in only one particular, namely, the initial deposit of $40,000.

With respect, I think the judgment proceeded upon a misapprehension of what really were the material facts. The vendors' refusal of the deposit on June 8, 1962 was coupled with an unequivocal repudiation of the agreement. That left two courses open to the purchaser — either to agree to rescission of the agreement or treat the repudiation as "writ in water". This is clearly laid down in section 40 of the Contracts (Malay States) Ordinance 1950 as follows:—

"When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiesence in its continuance."

The effect of a repudiation by one party to a contract is thus stated by Lord Reid in *White & Carter (Councils) Ltd.* v. *McGregor*:-[1]

"The general rule cannot be in doubt. It was settled in Scotland at least as early as 1848 and it has been authoritatively stated time and again in both Scotland and England. If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract, whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect."

Where the promisee does not accept the repudiation as putting an end to the contract the legal position of the parties then is as stated by Cockburn C.J. in *Frost* v. *Knight*:-[2]

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it".

The position of the purchaser in the instant case is thus stated in *Fry* on Specific Performance (6th Ed.) p. 515 as follows:—

"Where the contract is in anywise unilateral, as, for instance, in the case of an option to purchase, a right of renewal, or of any other condition in favour of one party and not of the other, then any delay of the party in whose favour the contract is binding is looked at with especial strictness. On this principle, the delay of a purchaser in deciding whether he will or will not accept the title is an injustice, because the purchaser can enforce the contract against the vendor whether the title be good or bad, whereas the vendor can only do so in case of a good title."

In this case one should have thought that the purchaser would not hesitate to make his position clear one way or the other. Yet he did nothing of the sort. If he disagreed that the vendors were entitled to repudiate, he had only to say so. Had he been at all desirous of completing the purchase — even without vacant possession — all he had to do was perfectly simple, namely, give notice to the vendors of his intention so to do and tender the whole purchase price. What else were the vendors reasonably to assume by reason of his complete silence except that he

acquiesced in their tearing up the agreement? What was the proper inference the court should have drawn from his conduct? Should not he, as a reasonable man, have taken action within a reasonable time after a breach of contract by the other party, unless he in fact acquiesced in its rescission? In my opinion a lapse of over four years — between June 8, 1962 and August 29, 1966 — is not even within measurable distance of the reasonable time he needed to make up his mind. His conduct therefore compels me to conclude that he accepted the rescission. Having so agreed I cannot see how he is entitled even to damages, much less specific performance.

Here the purchaser had been solely responsible for a most inordinate delay. No satisfactory explanation had been given to account for it. Such delay had in fact resulted in benefits which were entirely one-sided. He had in the meantime the profitable use of his money, the whole sum of $160,000, which should have earned interest amounting to $38,400 in 4 years at 6 per cent if reckoned to the date of the writ, and approximately $67,200 when judgment was finally delivered in the action. This not inconsiderable sum was lost to the vendors. Had the price been tendered at the proper time and accepted, the interest that should have been earned would have been a gain to the vendors. Alternatively the moneys might have been invested in other lands at the current market value in 1962 which would have made up for the bad bargain which the vendors made in 1961. It is common knowledge that land values in Kuala Lumpur had been steadily rising since 1961 to the present day.

For the above reasons this appeal should be allowed and the judgment of the court below set aside with costs.

Gill and Ali F.JJ. concurred.

Appeal allowed.

Solicitors: *R. R. Chelliah Bros.; Ng Ek Teong & Partners.*

SUNGEI BIAK TIN MINES LTD. v. SAW CHOO THENG & ANOR.

[F.C. (Ong C.J. (Malaya), Gill & Ali F.JJ.) December 9, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X-81 of 1969]

Mining — Mining land — Working mining land in skilful and workmanlike manner — Using land for purposes other than mining — Whether breach of condition to work land in skilful and workmanlike manner — Mining Enactment (F.M.S. Cap. 147), ss. 14, 16(vii) & 97 — Schedule X, clause 4.

In this case the sublessors of mining land applied for cancellation of a sublease on the ground of breach of a condition thereof. It was alleged that tapioca had been planted in 60 acres of the mining land either by the sublessees or with their connivance. Evidence adduced at the trial showed that the sublessees had carried on mining operations on the land satisfactorily. Section 97 (ii) (b) of the Mining Enactment gives power to a Senior Inspector of Mines to cancel a sublease upon proof to his satisfaction that the sublessee has not worked the land in accordance with clause 4 of the sublease in the form in Schedule X; and clause 4 provides that the sublessee shall work the said land in an orderly and skilful and workmanlike manner and subject to the provisions of the Mining Enactment. The learned trial judge held that the sublessees had been in breach of section 16 (vii) of the Enactment as the planting of tapioca on the land could not be said to be user of the land for mining or purposes ancillary to mining; and therefore the sublease was liable to cancellation.

Held, allowing the appeal: (1) the evidence showed that the sublessees had worked the land with creditable results and in compliance with the mining regulations and the terms and conditions of their sublease;

(2) their infringement of section 16 (vii) of the Mining Enactment by the user of part of the land for planting tapioca did not affect their mining operations elsewhere upon the subleased land and did not entail the cancellation of the sublease.

Cases referred to:-

(1) *Griffiths* v. *J.P. Harrison (Watford) Ltd.* [1962] 2 W.L.R. 909, 915.

(2) *Hardwick Game Farm* v. *Suffolk Agricultural Poultry Producers Association* [1966] 1 W.L.R. 287, 304, 310, 324.

FEDERAL COURT.

Lim Ewe Hock (*Lim Kean Chye* with him) for the appellants.

Peter Mooney for the respondents.

Cur. Adv. Vult.

Ong C.J.: This appeal raises for the first time the proper interpretation of clause 4 in the statutory form of mining sub-lease, as prescribed by Schedule X of the Mining Enactment (Cap. 147), which provides —

"4. That the sub-lessee shall work the said land in an orderly, skilful and workmanlike manner and subject to the provisions of the Mining Enactment and shall be liable to indemnify the sub-lessor for any expenses which he may incur, whether as fine inflicted on him or otherwise, on account of any breach of this condition by the sub-lessee."

The action arose out of an application made originally in the court of the senior inspector of mines — which was transferred for adjudication to the High Court in Ipoh at the instance of the sublessors — for cancellation of a sublease on the ground of breach of a condition thereof by the sublessees. The breach complained of lay in the planting of tapioca on 60 acres of the mining land, either by the sublessees or with their connivance, which the sublessors claimed was such contravention of the Mining Enactment as rendered the sublease liable to cancellation in accordance with an express condition therein.

The facts may be set out in a few words, since the findings of the trial judge are not challenged in this appeal. The sublessors, now respondents, had, on August 7, 1965 subleased approximately 188 acres of mining land to the appellants. Part of the land, comprised in Lots 2312 and 2311, was under young rubber still not ripe for tapping. While carrying on mining operations elsewhere on the subleased land, the appellants caused or permitted the felling of about 60 acres of this rubber for the planting of tapioca, without the respondents' knowledge or consent. This occurred between September 1967 and February 1968. Complaint was first made to the senior inspector of mines on